Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

RICHARD A. GIDDENS, Petitioner

v.

SHELL OIL COMPANY and
JACK TUCCI, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a severe and pervasive pattern of verbal and physical abuse of a sexual nature visited upon a male employee by a heterosexual male supervisor and heterosexual male co-workers, which is based on sex stereotyping by said supervisor and co-workers and which results in a hostile and abusive working environment, is actionable under Title VII of the Civil Rights Act of 1964.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties to the Proceedings in the Court Below	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Treaties, Statutes, Rules and Regulations Involved	2
Statement of Case	3
Reasons for Granting Writ	7
Conclusion	15
Appendix	17

TABLE OF AUTHORITIES

Cases **Page**

Baines v. Costle, 561 F.2d 983, 900, n.55 (D.C. Cir. 1977) 14

Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) 13

Harris v. Forklift Systems, ___ U.S. ___ 114 S.Ct. 367 (1993) 9

Holloway v. Arthur Anderson and Co., 566 F.2d 659 (9th Cir. 1977) 14

Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986) 7, 10, 13

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989) 10, 11

Rosen v. Public Service Electric and Gas Co., 409 F.2d 775 (3rd cir. 1969) 9

Tomkins v. Public Service Electric and Gas Co., 568 F.2d 1044, 1046, n.4 (3rd Cir. 1972) 9

Voyles v. Ralph K. Davies Medical Center, 403 F.Supp. 456 (N.D. Cal 1975), aff'd 570 F.2d 354 13

Williamson v. A. G. Edwards and Sons, Inc., 876 F.2d 69 (8th Cir. 1989) 13

Wright v. Methodist Youth Services, 511 F.Supp. 307 (N.D. Ill. 1981) 14

Statutes **Page**

42 U.S.C. §2000e-2 et seq.. 2, 7, 9, 11, 13, 15

IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD A. GIDDENS, Petitioner,

v.

SHELL OIL COMPANY and JACK TUCCI, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD A. GIDDENS, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 6, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, was entered on December 6, 1993, in Case No. 92-8533, and such decision is unpublished. Such opinion is reprinted in the Appendix below.

The prior opinion of the United States Court for the Western District of Texas,

Midland/Odessa Division, was entered on August 5, 1992, in Case No. MO-91-CA-098, and such decision is unpublished. Such opinion is reprinted in the Appendix below.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its judgment and opinion on December 6, 1993. Petitioner's Motion for Rehearing was denied on January 18, 1994. Jurisdiction is based on 28 U.S.C. 1541(c).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

42 U.S.C. §2000e-2. Unlawful employee practices.

(a) Employer practices. It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because

of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This is a hostile environment sexual harassment action brought by Petitioner RICHARD A. GIDDENS (hereinafter "GIDDENS"), a former employee of Respondent SHELL OIL COMPANY (hereinafter "SHELL"), Respondent JACK TUCCI (hereinafter "TUCCI"), a Shell Oil Company foreman, and Respondent CRAIG HARNER (hereinafter "HARNER"), a Shell Oil Company employee.

Factual Basis

From 1985 until May, 1991, GIDDENS was employed as an operator at SHELL's Odessa refinery. In 1988, SHELL assigned TUCCI as supervisor on GIDDENS' shift. TUCCI objected to personal characteristics which GIDDENS exhibited, such as softness and lack of aggressiveness, which TUCCI regarded as conflicting with his stereotyped view of what a male should be like. As a result, TUCCI engaged in a pattern of harassment and abuse which

included derogatory sexual comments and physical contact with GIDDENS' genitals. TUCCI enlisted another SHELL employee, HARNER, in his program of abuse. In early 1989, HARNER and TUCCI pushed GIDDENS into the corner of a restroom and "hunched on him like a couple of dogs". GIDDENS reported the attack to SHELL management, but SHELL management took no action. Approximately four to six months later, TUCCI and HARNER took their genitals out of their pants and rubbed them on GIDDENS. GIDDENS again complained to SHELL management, and again SHELL management took no corrective action. If anything, TUCCI increased the frequency of his harassment of GIDDENS.

The final, and certainly most heinous, incident of GIDDENS' two and one-half year ordeal occurred in February, 1991. TUCCI and HARNER came up behind GIDDENS as he was sitting in a chair and pinned him in the chair. TUCCI and HARNER then each grabbed GIDDENS' arms and legs and suspended him upside down in the air.

HARNER then rubbed GIDDENS' genitals and placed his finger in GIDDENS' rectum. GIDDENS reported this attack to SHELL management, who finally responded by terminating HARNER and forcing TUCCI to retire. By this time, however, GIDDENS had been seriously emotionally and physically damaged. SHELL placed him on disability leave a short time later.

The Rulings Below

The District Court entered judgment in favor of Defendants SHELL and TUCCI based on a jury verdict. As to GIDDENS' Title VII claim, however, the take-nothing judgment was based on the jury's negative answer to an improper interrogatory. Specifically, the jury was asked, "Do you find from a preponderance of the evidence that Jack Tucci made or threatened to make employment decisions affecting the employment status of Richard Giddens?" As the pleadings and proof clearly established a hostile environment sexual harassment claim rather than a quid pro quo sexual harassment

claim, this question was not an element of GIDDENS' case, yet GIDDENS was denied judgment thereby in spite of the jury's affirmative finding that GIDDENS had been sexually harassed.

GIDDENS filed his appeal with the United States Court of Appeals for the Fifth Circuit complaining of, among other things not germane to this petition, the "employment decisions" interrogatory cited above. SHELL responded with a cross appeal which stated, in essence, that the improper interrogatory was irrelevant because the District Court should have granted SHELL's Motions for Summary Judgment and Judgment as a Matter of Law on the grounds that GIDDENS had failed to state a claim under Title VII.

On December 6, 1993, a panel the United States Court of Appeal for the Fifth Circuit affirmed the take nothing judgments of the Trial Court. In pertinent part, the Fifth Circuit held that, "Harassment by a male supervisor against a male subordinate does not state a

claim under Title VII even though the harassment has sexual overtones." As a result of this ruling, the Fifth Circuit did not reach the question of the "employment decision" interrogatory. As noted earlier, GIDDENS' motion for rehearing was denied.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Court of Appeals has decided an important question of Federal Law in a way that conflicts with the applicable decisions of this Court.

In reaching its decision to affirm the Trial Court, the Fifth Circuit expressly held that there was no evidence to show how GIDDENS' employer treated him differently because he was male. This holding required an incorrect interpretation of three decisions of this Honorable Court.

In Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986), this Court expressly recognized that Title VII of the Civil Rights Act of 1964 supports a cause of action for hostile work environment sexual harassment. In reaching this conclusion, the Court clearly held

that Congress did not intend any distinction between purely economic discrimination and discrimination in other "conditions and privileges of employment", Id., at 63. Thus, hostile environment sexual harassment is not a judicially created remedy or analytical construct, but rather the recognition that, in accordance with the plain meaning of the statute, selectively imposing intolerable working conditions on the basis of sex (or any other prohibited criteria) is just as real a form of discrimination as disparate pay or the refusal to hire or promote. Logically, therefore, principles applicable to economic discrimination must also apply to hostile environment discrimination. In other words, a court deciding a "hostile environment" case may not justify disregard of a legitimate precedent of this Court merely because it was set forth in a case involving tangible economic benefits.

In the case at bar, GIDDENS was subjected to sever and pervasive sexual harassment by his

male supervisor and a male co-worker. The harassment was most certainly meant to demean, harass, and intimidate GIDDENS. The harassment clearly altered a condition of GIDDENS' employment and created a hostile work environment as contemplated by Supreme Court precedent. This severe conduct should not escape the purview of Title VII protection.

Title VII of the Civil Rights Act prohibits sex discrimination against men as well as women. Tomkins v. Public Service Electric and Gas Co., 568 F.2d 1044, 1046, n.4 (3rd Cir. 1972) citing Rosen v. Public Service Electric and Gas Co., 409 F.2d 775 (3rd cir. 1969). When that discrimination is in the form of severe sexual harassment which creates a hostile work environment, males are also protected. This Court, in Harris v. Forklift Systems, ___ U.S. ___ 114 S.Ct. 367 (1993), stated that the language of Title VII clearly evinces a congressional intent to "'strike at the entire spectrum of disparate treatment of men and women

in employment'", which includes requiring people to work in a discriminatory, hostile, or abusive environment. [Emphasis added.] citing Meritor, supra.

GIDDENS' evidence at trial clearly supports the conclusion that TUCCI and HARNER held a narrow, clearly defined, and undoubtedly archaic view of what a man must be. A man, in their view, must be rough and aggressive. The record is equally clear that GIDDENS' failure to measure up to this standard was, at the very least, a pivotal factor in his being targeted for harassment and abuse of a blatantly sexual nature which created a working environment for GIDDENS that was both hostile and intolerable. The Fifth Circuit's holding that this kind of evidence does not demonstrate conduct based on GIDDENS' sex is in direct conflict with an applicable decision of this Court.

In Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989), this Court was confronted with a case wherein the employer was

alleged to have made an employment decision, at least in part, on the basis that a female employee was aggressive, although the employer apparently regarded this quality as desirable in its male employees. The Court held, "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender", Id., at 250. The Court further ruled that sexually stereotypical remarks are evidence that gender has been a consideration. Finally, the Court held that where improper consideration of gender is even a partial cause of the actions in question, a cause of action under Title VII exists, Id., at 241.

Because hostile environment harassment is a form of discrimination just as is failure to promote, there is no basis in logic, this Court's prior decisions, or the plain language of Title VII for not applying the principles of Price Waterhouse to a hostile environment case.

Neither is there any justification for not applying the same rules where the victimized employee is male rather than female. Accordingly, the Fifth Circuit's holding that there was no evidence that GIDDENS' gender was a cause of the harassment complained of is in direct conflict with this Court's holding that acting on the basis of a sex stereotype is acting on the basis of gender.

Further evidence of disparate treatment because of GIDDENS' gender is found in SHELL's responses to GIDDENS' repeated complaints. It is inconceivable that SHELL would have responded to similar complaints from a female employee by advising her to "hang in there a little while", and "eventually we'll rotate in a new supervisor".

Certiorari should be granted because the United States Court of Appeals for the Fifth Circuit, as well as other lower Federal Courts, has decided an important question of Federal Law which has not been, but should be, settled by this Court.

This Court has not expressly addressed the question of whether, and under what

circumstances, male victims of sexual harassment are entitled to relief under Title VII. Under the clear authorities of this Court and other courts, it is beyond question that GIDDENS would have a Title VII cause of action if he were female, Meritor Savings Bank, supra. The lower courts have been left to determine the thorny issues created by the differing genders, orientations, and personality traits of the respective parties. The results have not been uniform and demonstrate a tendency to draw unnecessarily fine distinctions in a decisional matrix based on the gender and sexual orientation of both supervisor and employee. For example, homosexuals may be discriminated against because of their sexual "preference" with impunity, Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979), Williamson v. A. G. Edwards and Sons, Inc., 876 F.2d 69 (8th Cir. 1989). Transsexuals have been lumped with homosexuals and bisexuals, Voyles v. Ralph K. Davies Medical Center, 403 F.Supp. 456 (N.D. Cal 1975), aff'd

570 F.2d 354, Holloway v. Arthur Anderson and Co., 566 F.2d 659 (9th Cir. 1977). If, however, the supervisor is homosexual, an employee of the same gender can recover under Title VII, Wright v. Methodist Youth Services, 511 F.Supp. 307 (N.D. Ill. 1981).

Perhaps the most absurd result that would be compelled by this gender/sexual preference matrix would be that of the bisexual supervisor. Such an individual would be free to sexually harass whomever he or she chose because his or her choices would presumably not be limited or influenced by the victim's gender, Baines v. Costle, 561 F.2d 983, 900, n.55 (D.C. Cir. 1977).

These gender/sexual preference distinctions are artificial, time consuming, and prompt unnecessary inquiry into the peculiar sexuality of the parties involved. These considerations can, and should be, eliminated by refocusing on whether the employer or supervisor pigeonholed the employee in a sexual stereotype and acted

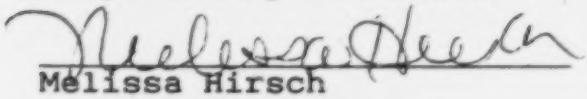
thereon. This refocusing cannot be achieved without the intervention of this Court.

Finally, this Court should act because the decisional matrix now so widespread among the lower courts does not adequately deal with the discrimination Title VII was enacted to eliminate. By not sanctioning sex stereotyping, the lower courts tacitly approve it and contribute to its perpetuation. A supervisor or employee who believes a man must be aggressive and/or a woman must not be and base his treatment of employees, even in part, on how they measure up to those prejudices is in no meaningful way different from one who is willing to provide equal employment opportunities to blacks, just so long as they exhibit an obsequious and subservient demeanor.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX

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INDEX TO APPENDIX

Page

A. Judgment of Court of Appeals 18

B. Judgment of Trial Court 21

C. Decision on Petition for Rehearing 28

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-8533

RICHARD A. GIDDENS, ET AL.,
Plaintiffs,
RICHARD A. GIDDENS,
Plaintiff-Appellant,
Cross-Appellee

versus

SHELL OIL COMPANY,
Defendant-Appellee,
Cross-Appellant,

and

JACK TUCCI,
Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Texas

(M-91-CV-98)

Before REAVLEY, DAVIS, Circuit Judges, and TRIMBLE,[1] District Judge.

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[1] District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:[2]

Our review of the record and the relevant law in this case persuades us that the district court correctly entered a take-nothing judgment against plaintiff, Richard Giddens.

Giddens failed to state a claim for relief under Title VII. Harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination. Giddens did not allege how his employer treated him differently because he was a male and he produced no evidence at trial tending to prove such facts. The district court, therefore, correctly dismissed Giddens' Title VII action.

Giddens' action for negligent infliction of

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[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

emotional distress and negligent hiring and supervision are barred by the Texas Workers' Compensation Act.

Giddens' claim for intentional infliction of emotional distress against Shell is precluded by the jury's finding that Tucci's acts were not committed in the course and scope of his employment.

We need not consider Giddens' claim for intentional infliction of emotional distress against Tucci, because Giddens has not complained about the district court's dismissal of his action against Tucci.

For these reasons, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

RICHARD A. GIDDENS, TRACY GIDDENS and RICHARD A. GIDDENS, JR. Plaintiffs	)	
VS.	)	CIVIL ACTION NUMBER MO91-CA-098
SHELL OIL COMPANY and JACK TUCCI Defendants	)	

FINAL JUDGMENT

This action came on for trial before the Court and a jury, Honorable Lucius D. Bunton, III, United States District Judge, presiding, the issues having been duly tried, the jury rendered the following verdict:

QUESTION NO. 1

1. Do you find from a preponderance of the evidence that Tucci and/or Harner acted intentionally or recklessly in their treatment of Richard Giddens?

   Jack Tucci ___X___ Yes _____ No

   Craig Harner ___X___ Yes _____ No

2. Do you find from a preponderance of the evidence that Tucci's and/or Harner's conduct was extreme and outrageous?

Jack Tucci ___X___ Yes _____ No

Craig Harner ___X___ Yes _____ No

3. Do you find from a preponderance of the evidence that Tucci's and/or Harner's conduct caused Richard Giddens emotional distress?

Jack Tucci ___X___ Yes _____ No

Craig Harner ___X___ Yes _____ No

If you have answered "Yes" to Question No. 3, please answer Question No. 4. If you have answered "No" to Question No. 3, please go on to Question No. 7.

4. Do you find from a preponderance of the evidence that the emotional distress suffered by Richard Giddens was severe?

___X___ Yes _____ No

5. Do you find from a preponderance of the evidence that the extreme and outrageous conduct of Jack Tucci was in the course and scope of his employment?

_____ Yes ___X___ No

6. Do you find form a preponderance of the evidence that the extreme and outrageous conduct of Craig Horner was in the course and scope of his employment?

_____ Yes ___X___ No

7. Do you find from a preponderance of the evidence that Shell acted negligently in any of the following

acts?

(a) Failing to property supervise Jack Tucci

__X__ Yes _____ No

(b) Failing to properly supervise Craig Horner

__X__ Yes _____ No

(c) Failing to fire Jack Tucci before February 1991

_____ Yes __X__ No

(d) Failing to fire Craig Horner before February 1991

__X__ Yes _____ No

If you have answered "Yes" to any part of Question No. 7, please answer Question No. 8. If you have answered "No" to each part of Question No. 7, please skip Question No. 8.

8. Do you find from a preponderance of the evidence that such act was a proximate cause of any injury to Richard Giddens?

_____ Yes __X__ No

If you have answered "Yes" to Question No. 4 or Question No. 8, please answer Question No. 9 and Question No. 10. If you have answered "No" to both questions No. 4 and Question No. 8, please skip Questions No. 9 and No. 10.

9. What sum of money, if paid now in cash, would fairly and reasonably

compensate Richard Giddens for his injuries, if any, that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do no include damages for one element in any other element. Do no include interest on any amount of damages you find.

ELEMENT A. Physical pain and mental anguish in the past, in any.
ANSWER $ 5000 .

ELEMENT B. Physical pain and mental anguish which he, in reasonable probability, will suffer in the future, if any.
ANSWER $ 5000 .

ELEMENT C. Loss of earning capacity in the past, if any.
ANSWER $ 20,000 .

ELEMENT D. Loss of earnings in the future.
ANSWER $ 70,000 .

10. What sum of money, if paid in cash, would fairly and reasonably compensate Tracy Giddens for injuries, if any to her husband, Richard Giddens that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. do

no include damages for one element in any other element. Do not include interest on any amount of damages you find.

ELEMENT A. Loss of household services.

ELEMENT B. Loss of consortium.

"Household services" means the performance of household and domestic duties by a spouse to the marriage.

"Consortium" means the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, sexual relations, emotional support, love, and felicity necessary to a successful marriage.

Answer in dollars and cents for damages, or none, that were sustained in the past and that in reasonable probability will be sustained in the future.

ANSWER: None

11. Do you find from a preponderance of the evidence that Richard Giddens was sexual harassed by Jack Tucci?

ANSWER "YES" or "NO"

ANSWER: Yes

If you have answered Yes to Question No. 11 please answer Question No. 12.

12. Do you find from a preponderance of the evidence that the sexual harassment was sufficiently severe or pervasive to alter the conditions of Richard Giddens' employment and

create an abrasive working environment?

ANSWER "YES" or "NO"

ANSWER: Yes

If you have answered Yes to Question No. 12 please answer Question No. 13.

13. Do you find from a preponderance of the evidence that Jack Tucci made or threatened to make employment decisions affecting the employment status of Richard Giddens?

ANSWER "YES" or "NO"

ANSWER: No

August 5, 1992 — Dated

E. Sharon Dougherty — Foreperson

Based on the foregoing verdict, it is ordered and adjudged that the Plaintiff Richard A. Giddens recover of the Defendant Jack Tucci the sum of $100,000 upon the Plaintiffs' first cause of action for intentional infliction of emotional distress, with interest thereon at the rate provided by law, and the Plaintiffs' costs of this action.

It is further ordered and adjudged that all other causes of action asserted by the Plaintiffs Richard A. Giddens, tracy Giddens and

Richard A. Giddens, Jr., against the Defendants Shell Oil Company and Jack Tucci be dismissed with prejudice and that the Defendant Shell Oil Company recover its costs of this action from the Plaintiff Richard Giddens.

Signed this 2nd day of September, 1992 in Midland, Texas.

Lucius D. Bunton
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8533

RICHARD A. GIDDENS, ET AL.,
Plaintiffs,

RICHARD A. GIDDENS,
Plaintiff-Appellant,
Cross-Appellee,

versus

SHELL OIL COMPANY,
Defendant-Appellee,
Cross-Appellant,

and

JACK TUCCI,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING
(JANUARY 18, 1994)

Before REAVLEY, DAVIS, Circuit Judges and TRIMBLE, District Judge.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge

*District Judge of the Western District of Louisiana sitting by designation.